

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 EASTSIDE LINCOLN MERCURY, : CIVIL ACTION C-1-01-567
5 et al., :
6 Plaintiffs, : Cincinnati, Ohio
7 : Monday, September 29, 2003
8 :
9 -vs- :
10 :
11 FORD MOTOR COMPANY, et al., : Conference in chambers
12 :
13 :
14 Defendant. : 3:05 p.m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN J. DLOTT, JUDGE

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1 that's in place.

2 THE COURT: When did discovery --

3 MR. BERBERICH: June, I think it was June 2nd, or
4 it extended to June 2nd. Because there was a witness that
5 kind of came out of the cold so to speak. He came up to
6 us. He was a former employee of Mr. Reichert. So, anyway,
7 and he also testified that there was money that was given
8 preferentially to Mr. Reichert's dealerships that was not
9 also offered to Mr. Woeste's dealerships. And, as a
10 consequence of that, our allocation expert has done a
11 significant amount of preliminary work but also needs some
12 responses or some documents from Ford in order to finish
13 his opinions on whether, in fact, there are allocation
14 manipulations that have affected our dealership.

15 And so we went ahead and filed a motion.
16 Mr. Hengehold and Ms. McNellie's offices both filed
17 opposing motions saying that, when we met with the Court
18 the last time, Your Honor said these dates are in stone.
19 If you don't comply, you're done, something. I'm
20 paraphrasing.

21 THE COURT: That sounds about right.

22 MR. BERBERICH: Okay. And so that's why we're
23 before the Court. It's been briefed on summary judgment.
24 One of the big defenses that the defendants raised is you
25 don't have a damage expert. Well, we have a CPA who

1 rendered preliminary opinions before discovery was
2 completed on the damages that we suffered. Now he's
3 finalizing his opinions. But a lot of that is also going
4 to hinge on what the allocation expert says. Because they
5 can make a damage analysis that says, if you were denied
6 five cars this year, then this is the downstream impact
7 this is going to have on your dealership.

8 So we need to have a ruling from the Court on the
9 allocation expert so that our financial expert can conclude
10 his numbers and assumptions. The defense has raised the
11 issue, you know, that we haven't properly identified a
12 damages expert. We believe that we have. The Court, there
13 was some --

14 THE COURT: We're talking about two different
15 experts here now?

16 MR. BERBERICH: Correct.

17 THE COURT: So before -- I'm not sure what your
18 deadline was for expert identification.

19 MR. BERBERICH: We identified a gentleman by the
20 name of Roger Bean last year in '02 and provided a
21 preliminary report of his findings.

22 THE COURT: He's the accountant?

23 MR. BERBERICH: CPA. He's worked with our
24 dealership for a number of years, knows the financials
25 pretty well. Ford has an opposing expert, Dr. Mark

1 Schmitz, and, because Ford gets our financial information
2 very promptly, knows how many units we're selling and how
3 many parts we're selling, they were able to provide a
4 rebuttal report to Mr. Bean's preliminary report. But, in
5 order for Mr. Bean to do his final report and include the
6 allocation damage, we need to have a gentleman by the name
7 of Mr. Watkins, not only allowed to enter the case and
8 render expert opinions, but also to have some follow-up
9 documentation from Ford that we had requested and Ford says
10 is not available or was --

11 THE COURT: What would your timetable be for
12 this?

13 MR. BERBERICH: Probably -- well, there are two,
14 I guess two phases. One is to find out from Ford if these
15 documents are really lost. Like, for instance, there were
16 months of allocation reports that Ford says the manual
17 archive of these allocation reports was not captured for a
18 series of months due to a systems error. I have no idea
19 what that means. But our allocation expert says they
20 should have reports to find out how many cars Mr. Reichert
21 requested, how many he received, how many extra they gave
22 him, and for some significant periods of time when we think
23 that we were being targeted for consolidation.

24 THE COURT: What --

25 MR. BERBERICH: Probably 40 to 60 days.

1 report?

2 MR. BERBERICH: Yes. The preliminary report
3 breaks out seven different discrete areas of damage and
4 does the math on how he came up with his damage analysis.

5 THE COURT: Did you get the preliminary report?

6 MS. MCNELLIE: I did get the preliminary report,
7 but there was no supplementation. There was no provision
8 of the materials under Rule 26 at all. Supplementation
9 occurred well after the discovery was closed and we had
10 filed our motion for summary judgment.

11 MR. STATMAN: Since '02, they have never asked
12 for a deposition.

13 THE COURT: Was there any reason why you didn't
14 provide a final report?

15 MR. BERBERICH: Yes, Your Honor. After the --

16 THE COURT: Were you still getting documents or
17 not getting documents?

18 MR. BERBERICH: We were doing active discovery
19 heavily in February, March, April, May and June.

20 THE COURT: Of this year?

21 MR. BERBERICH: Of this year, right.

22 THE COURT: What kind of discovery?

23 MR. BERBERICH: Oh, not so much --

24 THE COURT: Depositions or documents?

25 MR. BERBERICH: Not so much documentary, but

1 was provided a year ago.

2 I didn't hear there were documents missing until
3 the time that they filed their reply brief in support of
4 the motion to designate an additional expert.

5 THE COURT: And I guess what you're saying is
6 that you didn't realize there were missing documents until
7 you took depositions and understood the significance of
8 some of the documents you had, and then you realized there
9 were other documents you needed.

10 MR. STATMAN: There were two issues on that
11 point. Issue one is they just said that they tried to
12 piece together what they could, but they never clearly
13 responded and said "We lost all these documents back then."
14 That's number one. Number two --

15 THE COURT: Do you agree with that?

16 MS. MCNELLIE: That we didn't tell them at the
17 time that there --

18 THE COURT: That month.

19 MS. MCNELLIE: That's right. We provided the
20 reports in lieu of the records that were missing.

21 MR. STATMAN: So that's one. And number two is
22 our expert opinion, as an accountant for the dealership, is
23 based on the accounting records of the dealership. Unlike
24 a typical case between some businesses and financial
25 damages where people have to actually exchange these

1 documents through discovery, Ford, on a monthly basis, has
2 a very significant detailed form that we must disclose
3 everything, including the name of any child we are thinking
4 of having, on this form. And it tells line item how many
5 cars, net profit, gross profit, you know, number of
6 employees, this, that and the other, overhead calculations,
7 parts calculations. They get this every month. Those are
8 the financials of the dealership.

9 They had -- the documents that he relied on are
10 obvious, any documents exchanged in discovery and the
11 financial statements provided to them monthly.

12 The hourly rate, I don't think that's a big deal.
13 You said what's your hourly rate. \$150 an hour. Is that
14 really a big prediscovery question? I just don't know see
15 how that prevents a deposition.

16 But the bigger issue is they chose all these
17 months to never ask to depose him and never sent us letters
18 complaining that the preliminary disclosure wasn't
19 adequate.

20 MS. MCNELLIE: That's not true. I have the
21 letter.

22 THE COURT: That's what I wanted to know.

23 MR. BERBERICH: And they filed --

24 THE COURT: Wait. Wait. You cannot all talk at
25 the same time.

1 That report they keep referring to, the
2 preliminary report of Mr. Bean, is very skeletal. And it
3 didn't meet the requirements then, and nobody argues that
4 it met Rule 26. It became moot because he gave him so much
5 more time. So here we are faced with having to re-rack it
6 and do it for another year or six months or eight months
7 and incur all the expenses associated with it when,
8 presumably, the reason it hasn't been done is that this
9 evidence doesn't exist, and we ought to just go forward as
10 it lays.

11 MR. BERBERICH: Your Honor, my only response is,
12 if this was an issue on January 2nd like they're saying and
13 they couldn't go forward, we have a 16-page report from
14 Dr. Schmitz which fairly well addresses each item that was
15 raised in Roger Bean's report. And why did they go through
16 six months of heavy discovery? I mean, we have done almost
17 all the traveling and the depositions and everything else.
18 If this was going to be a nonstarter on January 2nd, then
19 why wait until we get done with six months of discovery?

20 Because it's the same issue in a different light
21 in their summary judgment motion is they're saying we don't
22 have an expert. We're saying that we even have lay witness
23 testimony that clearly spells out what our damages are.

24 But, you know, the bottom line is that we have
25 disclosed Mr. Bean's preliminary report. His opinions are

1 footnoted. It shows how he does the math. You know, it's
2 a couple of pages, and it shows how he does the math as to
3 most of those items. The information he's basing it on is
4 something that Ford gets every month, and it's the same
5 information that Mr. Schmitz was -- Dr. Schmitz -- excuse
6 me -- was able to evaluate and piece together his own
7 opposition.

8 THE COURT: Let me ask you this. If the Court
9 set a new deadline of January 2nd, what was the old
10 deadline?

11 MR. BERBERICH: September, I think, something.

12 MS. MCNELLIE: I believe it was before that. It
13 was earlier. It was in the summer.

14 THE COURT: Than you found that you couldn't
15 comply. Then the appropriate thing to do at that point was
16 to move the Court for an extension of time of the expert
17 deadline. You didn't do that.

18 MR. BERBERICH: Your Honor, we provided -- again,
19 at that time, we provided an opinion that followed through
20 up to the date that it was made. Because, like, for
21 instance, Mr. Bean's supplemental opinion would simply
22 update the numbers, because more time has passed from the
23 date he rendered his preliminary report until now. So we
24 would simply update some numbers. The math that he's going
25 through is the same math that he provided in his